

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

GERALD CRAIG COLLICK,	)	
	)	CASE NO. C14-0299-MJP-MAT
Petitioner,	)	
	)	
v.	)	REPORT AND RECOMMENDATION
	)	
MARAGRET GILBERT,	)	
	)	
Respondent.	)	
_____	)	

INTRODUCTION AND SUMMARY CONCLUSION

Petitioner Gerald Collick is a Washington prisoner who is currently confined at the Monroe Correctional Complex in Monroe, Washington. Petitioner has submitted to this Court for review a petition for writ of habeas corpus under 28 U.S.C. § 2254 in which he seeks to challenge his 2010 King County Superior Court judgment and sentence. Respondent has filed an answer to the petition together with relevant portions of the state court record. Petitioner has filed a reply brief in support of his petition. This Court, having reviewed the petition, respondent's answer, and the balance of the record, concludes that petitioner's federal habeas petition should be dismissed because the petition is untimely and because all of petitioner's

01 claims are, in any event, procedurally barred.

02 PROCEDURAL HISTORY

03 The Washington Court of Appeals summarized the facts of petitioner's crimes and the  
04 trial court proceedings as follows:

05 In 2005, Gerald Collick attended Ashmead College with classmates  
06 Nathaniel Schleimer and Charity Cox. During the course of the school year, a  
07 conflict developed between Collick and Schleimer. Collick confided his  
08 frustrations about the school, Schleimer, and other matters in nightly telephone  
09 conversations with Cox. Collick's anger escalated and he eventually told Cox  
10 that he had purchased a gun and that he wanted to "shoot up the school." She  
11 testified that she was concerned that Collick was actually going to shoot people  
12 at the school. She informed Schleimer about these conversations, and he  
13 notified the police. In 2006, Collick pleaded guilty to harassment of Cox,  
14 Schleimer, and another person. The court entered anti-harassment orders  
15 protecting all three victims effective through June 19, 2008.

11 During the spring, summer, and fall of 2008, Collick contacted  
12 Schleimer and Cox by telephone. Collick left telephone messages for  
13 Schleimer on his home telephone in May and on June 13 and 15, 2008. He left  
14 two more telephone messages for Schleimer on his cell phone on August 3,  
15 2008.

14 The State charged Collick by second amended information with six  
15 counts of felony harassment for the calls to Schleimer and Cox. Each message  
16 formed the basis for each count in the amended information. The August 3,  
17 2008 messages to Schleimer were the subjects of counts III and IV. The State  
18 requested exceptional sentences for counts III through VI.

17 A jury convicted Collick on all six counts. The jury also found, by  
18 special verdict, that Collick's conduct had a destructive impact on someone  
19 other than the victim of the felony harassment in counts III through VI.

19 At sentencing, the court imposed concurrent, standard range sentences  
20 on counts I and II. The court imposed sentences of 60 months, above the  
21 standard range, on each of the remaining four counts. Each of these sentences  
22 is to run consecutively to each other and to counts I and II.

22 (Dkt. 17, Ex. 10 at 2-3 (footnote omitted).)

01           Petitioner appealed his convictions and sentence to the Washington Court of Appeals.  
02           Petitioner's appellate counsel presented three assignments of error to the Court of Appeals for  
03           review: (1) the evidence was insufficient to support the jury's special verdicts on counts III  
04           and IV that the offenses had "a destructive and foreseeable impact on persons other than the  
05           victim;" (2) the trial court erred when it imposed exceptional sentences for counts III through  
06           VI based on just one aggravating circumstance; and, (3) the trial court erred when it failed to  
07           incorporate its findings of facts and conclusions of law regarding the exceptional sentence into  
08           the face of the judgment and sentence. (*See* Dkt. 17, Ex. 6 at 1-2.) Petitioner also filed two  
09           *pro se* statements of additional grounds for review in which he presented various challenges to  
10           his convictions and a challenge to the inclusion in his criminal history of a prior proceeding in  
11           the State of Maryland which had been dismissed. (*See id.*, Exs. 7 and 8.) On April 4, 2011,  
12           the Court of Appeals issued an unpublished opinion affirming petitioner's convictions and  
13           sentence. (*Id.*, Ex. 10.)

14           Petitioner thereafter sought review by the Washington Supreme Court. Petitioner,  
15           through counsel, presented a single issue to the Supreme Court for review; *i.e.*, that the trial  
16           court erred when it sentenced petitioner to two types of exceptional sentence (a non-standard  
17           range sentence and an exceptional consecutive sentence) based on a single aggravating factor.  
18           (*See id.*, Ex. 11 at 1 and 3.) On September 6, 2011, the Washington Supreme Court denied  
19           review without comment. (*Id.*, Ex. 13.) The Washington Court of Appeals issued a mandate  
20           terminating direct review on October 12, 2011. (*Id.*, Ex. 16.)

21           Petitioner next filed a *pro se* petition for writ of certiorari in the United States Supreme  
22           Court. (*Id.*, Ex. 17.) The Supreme Court denied the petition on June 11, 2012. (*Id.*, Ex. 18.)

01 On May 31, 2013, petitioner filed a *pro se* personal restraint petition in the Washington  
02 Court of Appeals. (*Id.*, Ex. 19.) Petitioner raised the following issues in his petition: (1)  
03 trial counsel provided ineffective assistance; (2) the state presented insufficient evidence in  
04 support of the sentencing enhancements; (3) petitioner's offender score was miscalculated; (4)  
05 the admission of testimony that Nathaniel Schleimer's girlfriend, Sonya Vargas, was afraid  
06 petitioner's threats would be carried out violated his rights under the Confrontation Clause; and  
07 (5) the trial court erred in failing to incorporate its findings of fact and conclusions of law  
08 supporting the exceptional sentence into the judgment and sentence. (*See* Dkt. 17, Ex. 19 at  
09 7-8.) The Court of Appeals issued an order dismissing the personal restraint petition on  
10 November 13, 2013. (*Id.*, Ex. 21.)

11 On December 4, 2013, petitioner filed a motion for extension of time with the  
12 Washington Supreme Court requesting an additional 90 days in which to file a motion for  
13 discretionary review. (*Id.*, Ex. 22.) On the same date, the Clerk of the Supreme Court denied  
14 the motion for extension of time, noting that petitioner had not demonstrated any extraordinary  
15 circumstances which would justify an extension, and had not referenced the nature of any issue  
16 on which he might seek review and why review would be justified. (*Id.*, Ex. 23.) Petitioner  
17 thereafter filed a motion to modify the Clerk's ruling along with a second motion for extension  
18 of time. (*Id.*, Exs. 24 and 25.)

19 On December 23, 2013, the Clerk of the Supreme Court set petitioner's two motions, as  
20 well as a Clerk's motion to dismiss the matter for failure to serve and file a timely motion for  
21 discretionary review, on the court's calendar for consideration on February 4, 2014. (*Id.*, Ex.  
22 27.) On February 5, 2014, the Chief Justice of the Washington Supreme Court entered an



01 the imposition of consecutive sentences.

02 (*See* Dkt. 10 at 5, 7, 8 and 10.)

03 DISCUSSION

04 Respondent argues in his answer to petitioner's petition that the petition is untimely  
05 under the federal statute of limitations, 28 U.S.C. § 2244(d). Respondent also argues that  
06 petitioner failed to properly exhaust any of the claims asserted in the instant petition and that the  
07 claims are now procedurally barred under an independent and adequate state law.

08 Statute of Limitations

09 Pursuant to §2244(d)(1), a one year period of limitation applies to an application for a  
10 writ of habeas corpus filed a by a person in custody pursuant to the judgment of a state court.  
11 The one year limitation period generally begins to run from the date of the conclusion of direct  
12 review or "the expiration of the time for seeking such [direct] review," whichever is longer. 28  
13 U.S.C. § 2244(d)(1)(A). In this case, the period for direct review ended when the United  
14 States Supreme Court denied petitioner's petition for writ of certiorari. *Gonzales v. Thaler*,  
15 132 S. Ct. 641, 653 (2012). The Supreme Court denied petitioner's petition on June 11, 2012,  
16 and petitioner's one year statute of limitations began to run on the following day. *See Corjasso*  
17 *v. Ayers*, 278 F.3d 874, 877 (9th Cir. 2002).

18 The one year limitation period is tolled for any "properly filed" collateral state  
19 challenge to the state conviction. 28 U.S.C. § 2244(d)(2). Petitioner filed a timely personal  
20 restraint petition in the Washington Court of Appeals on May 31, 2013, which stopped the  
21 clock on the federal statute of limitations. At that time, 353 days had run on the statute of  
22 limitations. The Court of Appeals dismissed petitioner's personal restraint petition on

01 November 13, 2013.

02 Under Rule 13.5(a) of the Washington Rules of Appellate Procedure, petitioner had 30  
03 days within which to file a motion for discretionary review of the Court of Appeals' order  
04 dismissing his personal restraint petition. Petitioner did not file a motion for discretionary  
05 review within the requisite time period but, instead, sought an extension of time to file such a  
06 motion. The Supreme Court rejected petitioner's efforts to obtain an extension of time,  
07 concluding that petitioner had not met the requirements for obtaining such an extension under  
08 Rule 18.8(b) of the Washington Rules of Appellate Procedure.<sup>2</sup> The Washington Supreme  
09 Court denied petitioner's requests for an extension of time and dismissed the action on February  
10 5, 2014.

11 Respondent argues that the clock on the federal statute of limitations started to run again  
12 on December 13, 2013, the deadline for petitioner to file a motion for discretionary review in  
13 the Washington Supreme Court. Respondent maintains that because petitioner's motions for  
14 extension of time to file his motion for discretionary review were denied, there was no  
15 "properly filed application for state post-conviction or other collateral review" pending in  
16 petitioner's case after that date. Respondent's argument appears to have merit. However, this  
17 Court need not conclusively resolve that issue.

18 It suffices, for purposes of this case, to recognize that petitioner's personal restraint

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19 <sup>2</sup> RAP 18.8(b) provides:

20 The appellate court will only in extraordinary circumstances and to prevent a  
21 miscarriage of justice extend the time within which a party must file a notice of appeal, a notice  
22 for discretionary review, a motion for discretionary review of a decision of the Court of Appeals,  
a petition for review, or a motion for reconsideration. The appellate court will ordinarily hold  
that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an  
extension of time under this section. The motion to extend time is determined by the appellate  
court to which the untimely notice, motion or petition is directed.

01 proceedings terminated, at the latest, on February 5, 2014, the day the Washington Supreme  
02 Court denied petitioner's requests for extension of time and dismissed the action. The statute  
03 of limitations began to run the following day, February 6, 2014, and expired 12 days later on  
04 February 18, 2014. Petitioner signed the original habeas petition submitted in this action on  
05 February 26, 2014, eight days after the statute of limitations expired.

06 The statute of limitations governing federal habeas petitions is subject to equitable  
07 tolling. *Holland v. Florida*, 130 S.Ct. 2549 (2010). However, the Ninth Circuit has made  
08 clear that equitable tolling is available "only when extraordinary circumstances beyond a  
09 prisoner's control make it impossible to file a petition on time and the extraordinary  
10 circumstances were the cause of his untimeliness." *Laws v. Lamarque*, 351 F.3d 919, 922 (9th  
11 Cir. 2003) (internal quotation and citation omitted). Petitioner appears to suggest in his  
12 response to respondent's answer that he is entitled to equitable tolling because the Department  
13 of Corrections contract attorney who provided him advice regarding post-conviction  
14 proceedings failed to thoroughly explain how the tolling provisions of the federal statute of  
15 limitations would impact these proceedings. However, petitioner's lack of knowledge  
16 regarding the operation of the tolling provisions applicable to federal habeas actions does not  
17 constitute the type of "extraordinary circumstance" that would entitle petitioner to equitable  
18 tolling. Moreover, petitioner makes no showing that his lack of knowledge regarding the  
19 tolling provisions was, in fact, the cause of his untimeliness.

20 Because petitioner filed his petition outside the § 2254 statute of limitations period, and  
21 because petitioner has not demonstrated that he is entitled to equitable tolling of the limitations  
22 period, his petition is time-barred.



Exhaustion and Procedural Default

Respondent also argues in his answer to petitioner's federal habeas petition that even if the petition were to be deemed timely, it must nonetheless be dismissed because petitioner's claims are now procedurally barred. Respondent is correct.

A state prisoner is required to exhaust all available state court remedies before seeking a federal writ of habeas corpus. 28 U.S.C. § 2254(b)(1). The exhaustion requirement is a matter of comity, intended to afford the state courts "an initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Picard v. Connor*, 404 U.S. 270, 275 (1971) (internal quotation marks and citations omitted). In order to provide the state courts with the requisite "opportunity" to consider his federal claims, a prisoner must "fairly present" his claims to each appropriate state court for review, including a state supreme court with powers of discretionary review. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (citing, *Duncan v. Henry*, 513 U.S. 364, 365 (1995), and *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999)).

The record makes clear that petitioner failed to present any of his federal habeas claims to the Washington Supreme Court for review. Petitioner therefore failed to properly exhaust his claims. Respondent argues that petitioner, having failed to properly exhaust many of his grounds for relief, would now be barred from presenting his claims to the state courts under RCW 10.73.090. RCW 10.73.090(1) provides that a petition for collateral attack on a judgment and sentence in a criminal case must be filed within one year after the judgment becomes final. Petitioner's conviction became final on June 11, 2012, the date the United States Supreme Court denied petitioner's petition for writ of certiorari. Thus, petitioner would now be time barred from returning to the state courts to present his unexhausted claims.

01 See RCW 10.73.090.

02 Based upon the foregoing, this Court concludes that petitioner has procedurally  
03 defaulted on all of his federal habeas claims. When a state prisoner defaults on his federal  
04 claims in state court, pursuant to an independent and adequate state procedural rule, federal  
05 habeas review of the claims is barred unless the prisoner can demonstrate cause for the default  
06 and actual prejudice as a result of the alleged violation of federal law, or demonstrate that  
07 failure to consider the claims will result in a fundamental miscarriage of justice. *Coleman v.*  
08 *Thompson*, 501 U.S. 722, 750 (1991). Petitioner makes no such showing. Thus, even if  
09 petitioner could establish that his habeas petition was timely filed, the petition must nonetheless  
10 be dismissed as procedurally barred.

#### 11 Certificate of Appealability

12 A petitioner seeking post-conviction relief under § 2254 may appeal a district court's  
13 dismissal of his federal habeas petition only after obtaining a certificate of appealability (COA)  
14 from a district or circuit judge. A certificate of appealability may issue only where a petitioner  
15 has made "a substantial showing of the denial of a constitutional right." See 28 U.S.C. §  
16 2253(c)(3). A petitioner satisfies this standard "by demonstrating that jurists of reason could  
17 disagree with the district court's resolution of his constitutional claims or that jurists could  
18 conclude the issues presented are adequate to deserve encouragement to proceed further."  
19 *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Under this standard, this Court concludes that  
20 petitioner is not entitled to a certificate of appealability in this matter.

#### 21 CONCLUSION

22 For the reasons set forth above, this Court recommends that petitioner's federal habeas

01 petition, and this action, be dismissed with prejudice. This Court further recommends that a  
02 certificate of appealability be denied. A proposed order accompanies this Report and  
03 Recommendation.

04 DATED this 10th day of July, 2014.

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07 Mary Alice Theiler  
08 Chief United States Magistrate Judge  
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